Case Nos. 7:20-cv-4276-VB; 7:20-cv-5440-VB; 7:20-cv-5529-VB

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE WINDSTREAM HOLDINGS, INC., et al.,
Debtors.

U.S. BANK NATIONAL ASSOCIATION, in its capacity as Indenture Trustee,
Appellant,
v.
WINDSTREAM HOLDINGS, INC., et al.,
Appellees.
(*Caption continued on inside cover*)

On Appeal from the United States Bankruptcy Court for the Southern District of New York, Bankr. Case No. 19-22312 (RDD)

BRIEF FOR THE DEBTORS

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September 2, 2020

CQS (US), LLC,

Appellant,

v.

WINDSTREAM HOLDINGS, INC., et al.,

Appellees.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 8012 of the Federal Rules of Bankruptcy Procedure, Appellee Windstream Holdings, Inc. certifies that it has no parent corporation, and no publicly traded corporation holds 10% or more of its stock. The other Debtors are all wholly-owned direct or indirect subsidiaries of Appellee Windstream Holdings, Inc., and no other publicly traded corporation holds 10% or more of their stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

This appeal represents a last-ditch attempt by out-of-the-money unsecured creditors—Appellants U.S. Bank National Association ("U.S. Bank"), as trustee for certain unsecured noteholders, and CQS (US) LLC—to undo a linchpin settlement and a confirmed plan of reorganization, and thereby force Appellee Windstream Holdings, Inc. and its debtor subsidiaries (together, "the Debtors") back into protracted and expensive bankruptcy proceedings. That attempt is both misguided and wholly meritless.

As a threshold matter, this appeal should be dismissed as equitably moot. Under binding Second Circuit precedent, an appeal that would overturn a substantially consummated plan of reorganization is presumed equitably moot, and Appellants cannot establish the factors required to overcome that presumption. Their appeal would not only require unraveling countless intricate transactions, but would impair the Debtors' ability to ever emerge from bankruptcy in the future. And despite knowing they were risking equitable mootness, Appellants made no meaningful attempt to seek a stay of the decisions they challenge. Those facts foreclose their attempt to pursue this appeal now.

Even if this Court were to reach the merits, it should readily affirm. The bankruptcy court came nowhere near abusing its discretion in approving the Debtors' hard-fought settlement with Uniti Group, Inc. ("Uniti"), which provided the Debtors

an undisputed *$1.2 billion* in value. The court properly applied all seven factors of the governing Second Circuit test, and properly determined that the massive value provided by the settlement was far preferable to the substantial risk of failure and the substantial costs that the Debtors would have faced from continuing the litigation. While Appellants "throw[] a fair amount of sand at the settlement," nothing they say "gums up the works." A1489. The bankruptcy court correctly rejected their self-interested attempt to force the Debtors to continue litigating (at more senior creditors' expense) in the unlikely hope of a "homerun victory." A1488.

The bankruptcy court likewise came nowhere near abusing its discretion in confirming the Debtors' plan of reorganization ("the Plan"), which enjoyed overwhelming support from the Debtors' creditors—including, notably, a majority of the unsecured creditors whose interests Appellants claim were harmed. The bankruptcy court correctly determined that the Plan complied with the requirements of the Bankruptcy Code, and in particular that the secured creditors' adequate-protection claim (compensating them for harm to their collateral during the bankruptcy proceedings) left no unencumbered value to distribute to unsecured creditors like Appellants. That determination was not a close call; in fact, as the bankruptcy court recognized, the secured creditors' adequate-protection claim exceeded any unencumbered value in the Debtors' estates by *hundreds of millions of dollars*. A2560. This Court should dismiss the appeal as equitably moot or affirm.

QUESTIONS PRESENTED

1. Whether the Court should dismiss this appeal as equitably moot.
2. Whether the bankruptcy court properly exercised its discretion by approving the Uniti settlement after determining that its value was well above the lowest point in the range of reasonableness.
3. Whether the bankruptcy court properly exercised its discretion by confirming the Plan after determining that the secured creditors' adequate-protection claim left no unencumbered value for unsecured creditors like Appellants.

STANDARD OF REVIEW

This Court has discretion to decide whether an appeal is equitably moot. *In re Charter Commc'ns*, 691 F.3d 476, 483 (2d Cir. 2012). A bankruptcy court's decision approving a settlement is reviewed for abuse of discretion, *In re Iridium Operating LLC*, 478 F.3d 452, 461 n.13 (2d Cir. 2007), as is its decision confirming a plan, *In re Kirwan Offices S.A.R.L.*, 592 B.R. 489, 500 (S.D.N.Y. 2018). Its findings of fact are reviewed for clear error, and its legal conclusions are reviewed *de novo*. *Id.* at 499-500.

STATEMENT OF THE CASE

A. The Uniti Transaction and Subsequent Litigation

The Debtors are a group of companies that provide telecommunications services throughout the United States. In 2015, the Debtors decided to split their business into two distinct publicly traded companies in order to improve financial

flexibility, attract investment, and improve tax and cash flow efficiency. A2732-2733. To that end, Windstream Holdings, Inc. ("Holdings") and its subsidiary Windstream Services, LLC ("Services") spun off a real estate investment trust now known as Uniti. A2734-2735. In connection with that transaction, subsidiaries of Services purported to transfer various telecommunications assets to Uniti, including fiber optic and copper cable lines, office buildings, and rights to certain permits, agreements, and easements, and Uniti then purported to lease those assets back to Holdings. A2741-2744; *see* A1185-1186.

The arrangement between Uniti and Holdings was governed by a master lease (the "Master Lease") that gave Holdings, as the "Tenant," the exclusive right to use the transferred assets for 15 years, with options to extend the term for up to 35 years. A2758-2761, A2792. Holdings then allowed the subsidiaries of Services to use and occupy the leased assets just as they had before the spinoff. A2735. At the time, the Debtors retained experienced professionals (Ernst & Young and Skadden, Arps, Slate, Meagher & Flom LLP) who issued opinions confirming the Master Lease was a true lease. SA41, SA43, SA45. The Debtors also repeatedly described the Master Lease as a true lease, and represented as much under oath to federal and state regulators. A1118-1119.

In 2017, the hedge fund Aurelius Capital Master, Ltd. ("Aurelius") acquired a controlling position in certain senior unsecured notes issued by Services, for which

U.S. Bank served as indenture trustee. Aurelius then directed U.S. Bank to sue Services, alleging that Services had breached the notes because the 2015 Uniti transaction constituted a prohibited sale and leaseback. A2778. That alleged default was not some unexpected surprise that Aurelius learned about only after acquiring the notes; the transaction was widely publicized when it occurred, and no noteholder raised any complaint at the time. Instead, Aurelius calculated that it would benefit from first obtaining a controlling position in the notes and then forcing the Debtors into default, *see* A1476, A1732, presumably because Aurelius had taken a much larger position in other investments that would profit from driving the Debtors into bankruptcy.

After 16 months of litigation, this Court (Furman, J.) held that Services was in default under the notes and awarded Aurelius a judgment of over $310 million. *U.S. Bank Nat'l Ass'n v. Windstream Servs., LLC*, No.17-cv-7857, 2019 WL 948120, at *23-24 (S.D.N.Y. Feb. 15, 2019); *see* A1476. While that unexpected multi-hundred-million-dollar adverse judgment presented significant liquidity challenges, it had no immediate effect on the value of the Debtors' assets or their ongoing business operations. A2024. To resolve those liquidity challenges, the Debtors filed voluntary chapter 11 petitions on February 25, 2019.

B. The Uniti Adversary Proceeding and Settlement

As part of their bankruptcy proceedings, and after careful investigation, the Debtors brought an adversary proceeding against Uniti seeking to recharacterize the Master Lease as a financing arrangement rather than a true sale and leaseback. A1476-1477. The Debtors also asserted related breach-of-contract and fraudulent-transfer claims. A1477.

After nearly a year of litigation, and an extensive and hard-fought mediation process (lasting seven months and involving some 27 mediation sessions, with an experienced bankruptcy judge as mediator), the Debtors and Uniti negotiated a settlement resolving the Debtors' claims in exchange for compensation with an undisputed net present value of *more than $1.2 billion*. A489-490. That compensation included a commitment by Uniti of up to $1.75 billion for growth capital improvements through December 2029; up to $125 million in equipment loans; and approximately $490 million in cash installment payments. The settlement also provided that the Debtors would sell certain assets to Uniti and would assume modified leases on the assets previously covered by the Master Lease. A494-495.

C. The Settlement Hearing and Settlement Order

The bankruptcy court held a two-day evidentiary hearing on the Debtors' motion to approve the settlement. At that hearing, the Debtors presented testimony from Nicholas Leone, their financial advisor; Anthony Thomas, their CEO; and Alan

Wells, board chairman for Services and Holdings. Leone's testimony, which was undisputed, established that the total quantifiable net present value that the Debtors would receive under the settlement was more than $1.2 billion. SA4, SA6-7; *see* A1205, A1325-1326. Thomas testified that the settlement would also provide additional benefits that were not easily quantifiable, enabling the Debtors to remain viable as a going concern and generating long-term value in a challenging and competitive market. A1113. Absent the settlement, Thomas testified, the Debtors would likely be forced to remain in bankruptcy for an additional 6 to 12 months or more, costing them over $750 million in bankruptcy expenses and lost business. A1115-1116. Thomas also detailed the substantial litigation risks that the Debtors faced, including significant adverse evidence and factual disputes. A1118-1119.

After hearing the evidence and oral argument, the court issued a detailed oral ruling approving the settlement. A1475-1497. Under governing Second Circuit precedent, a bankruptcy court deciding whether to approve a settlement must consider a set of seven interrelated factors known as the *Iridium* factors:

(1) the balance between the litigation's possibility of success and the settlement's future benefits;

(2) the likelihood, in the absence of the settlement, of complex and protracted litigation, with its attendant expense, inconvenience, and delay;

(3) the paramount interests of the creditors;

(4) whether other parties in interest support the settlement;

(5) the competency and experience of counsel supporting, and the experience and knowledge of the bankruptcy court judge reviewing, the settlement;

(6) the nature and breadth of releases to be obtained by officers and directors; and

(7) the extent to which the settlement is the product of arm's-length bargaining.

Iridium, 478 F.3d at 462; *see* Fed. R. Bankr. P. 9019(a). The court explicitly considered each of those seven factors and concluded that each one supported approving the settlement. A1477-1491.

On the first factor, the court found that the balance between the litigation's possibility of success and the settlement's future benefits weighed strongly in favor of approving the settlement. As the court explained in detail, *see* A1477-1481, the Debtors' claims faced "substantial litigation risks." A1485. On their recharacterization claim, which was the "primary focus" of their complaint, A1477, Second Circuit precedent would have required the Debtors to overcome a "strong presumption" that the Master Lease was a true lease. A1478 (citing *In re PCH Assocs.*, 804 F.2d 193, 200 (2d Cir. 1986)). The Debtors also faced significant adverse evidence on that issue: The Master Lease itself stated that it was a "true lease," not a security agreement; the Debtors had retained experienced professionals when the Master Lease was signed who issued opinions confirming that it was a true lease; and the Debtors had consistently described the arrangement as a true lease in public statements and representations under oath to federal and state regulators.

A1118-1119. Even if the Debtors succeeded on the merits, there was "far less clarity" on whether they had any meaningful remedy, since recharacterization would give Uniti an enormous counterclaim—potentially secured by an equitable lien on the recharacterized assets—resulting in little or no additional recovery for the Debtors' other creditors. A1479-1480; *see* A1427. The Debtors' other claims, the court concluded, likewise faced "significant problems." A1480-1481.

By contrast, the court found, the Debtors would receive "substantial value" under the settlement—quantifiable compensation worth *more than $1.2 billion*, plus significant non-quantifiable business benefits. A1485-1486. Weighing the massive and undisputed benefits of the settlement against the "material risk" of continuing to litigate, the court concluded that the settlement was "favorable to Windstream and well above the lowest range of reasonableness." A1486.

On the second factor, the court concluded that the Debtors would incur substantial costs if they continued to litigate, including the costs of trying the case on the merits, disputing the proper remedy, and litigating the "inevitable" subsequent appeals. A1486-1487. Continued litigation would also prolong the Debtors' "highly costly" bankruptcy case, A1487-1488, adding 6 to 12 months of bankruptcy proceedings at a cost of some $30 million per month, A1115-1116.

On the third and fourth factors, the court observed that "substantial creditors are in support of the settlement," and that forcing the Debtors to continue to litigate

would "jeopardize [those creditors'] recoveries in a meaningful way." A1488-1489. The court recognized that certain unsecured creditors (including U.S. Bank) opposed the settlement, but discounted their views given that those out-of-the-money creditors could recover only in the unlikely event of a "homerun victory in litigation." A1488.

On the fifth factor, the court found the Debtors were "clear[ly]" represented by capable counsel. A1490. On the sixth and seventh factors, the bankruptcy court found the settlement was the result of a long and "hard-fought" mediation process, lasting seven months and including at least 27 mediation sessions, all coordinated by the "extraordinary mediation efforts" of an experienced bankruptcy judge. A1490. The court also approved the Debtors' own consideration of the settlement, emphasizing that there was "absolutely no evidence" that any of their officers or directors had acted "in any way improperly." A1491. The court added that while the corporate-law "entire fairness" standard does not apply in this context, the settlement would meet that higher standard. A1491.

While U.S. Bank's numerous objections "succeeded in throwing a fair amount of sand at the settlement," the bankruptcy court found that none of those objections "gums up the works." A1489. It therefore entered an order approving the settlement (the "Settlement Order"), A1556-1628, which U.S. Bank appealed. A1878-1883. Appellants made no attempt to stay the Settlement Order pending appeal.

D. The Plan

The Debtors proceeded to propose their Plan, which is expressly conditioned on the approved settlement. A1681. The Plan provides for the partial equitization and partial repayment of the Debtors' prepetition first-lien debt and cancellation of junior debt, reducing their debt burden by some $3.6 billion, and (together with the benefits of the approved settlement) improves their cash flow by about $300 million per year. A1720-1724, A1729-1730. The Plan also ensures that thousands of employees will keep their jobs, and that more than 1.4 million residential and small-business customers will continue to have access to telephone and internet services.

On the Plan's effective date, the following transactions will occur: (1) all existing interest in the Debtors will be canceled, and reorganized equity interests will be issued to first-lien claimants; (2) proceeds from a new senior secured credit facility will be distributed to first-lien claimants and used to pay other allowed claims and fund various claim reserves; (3) liens granted under the new credit facility will be deemed approved; and (4) the Debtors will consummate a $750 million rights offering to first-lien claimants for reorganized equity interests. A1652-1659, A1720, A1722-1724.

The Debtors' secured creditors voted to accept the Plan, as did a majority of its unsecured voting creditors—the creditors whose interests Appellants claim the Plan harmed. A2524; *see* SA65 (recording that 66.17% by number and 55.51% by

amount of voting unsecured claims were in favor). But because a minority of the Debtors' unsecured voting creditors (including Appellants) opposed the Plan, the Debtors did not reach the two-thirds-by-amount threshold required for acceptance by that class. A2524; *see* 11 U.S.C. §1126(c).

E. The Confirmation Hearing and Confirmation Order

On June 24 and 25, 2020, the bankruptcy court held a two-day confirmation hearing. A2163-2578. The Debtors again presented testimony from Thomas, who explained that the Plan was "the exclusive option for Windstream to emerge from chapter 11 as a healthy and viable enterprise," A2008, and from Leone, who presented his financial analysis estimating the amount of the secured creditors' adequate-protection claim, A1934-1942.

Under the Bankruptcy Code and the bankruptcy court's debtor-in-possession ("DIP") order, the Debtors' secured creditors were granted a superpriority adequate-protection claim for the diminution in the value of their collateral during the bankruptcy proceedings (i.e., between the petition date when the Debtors filed for bankruptcy and the effective date when the Debtors emerge). 11 U.S.C. §§361, 507(b); A349, A352-354, A2537-2539. That claim has priority over claims by unsecured creditors like Appellants. 11 U.S.C. §507(b).

To determine the amount of that adequate-protection claim, Leone began by estimating the value of the collateral on the petition date. Because the secured

creditors held liens on the "vast majority" of the Debtors' assets, A2282, and the Debtors continued to use those assets in a going concern, Leone valued the collateral not by pricing each encumbered asset individually and adding up those values, but by valuing the Debtors' business as a whole and subtracting amounts not included in the collateral package to value the remaining encumbered assets. A1940 (showing calculation). Contrary to Appellants' repeated mischaracterization, Leone did not "concede[]" that his analysis "was not based on a generally accepted methodology," Br.40; in fact, he explained his methodology was a "commonly accepted valuation analysis" and "quite common" when liens cover substantially all of the debtor's assets. A2284.[1] Based on the Debtors' February 2019 financial projections, prepared shortly before the Debtors filed for bankruptcy, Leone estimated the petition-date collateral value at about [redacted]. A1939-1940 (calculating range of [redacted]).

Leone then applied the same methodology to estimate the effective-date collateral value, which he estimated at about [redacted] if the Uniti settlement proceeds were included and about [redacted] if those proceeds were excluded. A1939-1940 (calculating range of [redacted] including

[1] The testimony Appellants cite discusses using *securities prices* to estimate asset value—a methodology Leone used only as a "helpful indicator" to *confirm* his valuation, not to value the collateral in the first instance. A2314, A2327; *see* A1940.

settlement proceeds, and [redacted] otherwise). As such, the diminution in collateral value between the petition date and the effective date was about [redacted] if the settlement proceeds were encumbered, and about [redacted] if they were not. A1940. After subtracting the $471 million in adequate-protection payments that the secured creditors received during the bankruptcy, A1966-1967, Leone estimated the remaining adequate-protection claim at about $700 million if the settlement proceeds were encumbered and about $1.9 billion if not. A1935 (calculating ranges of $654 million to $727 million and $1.899 billion to $1.971 billion); *see* A1941, A1948, A1966-1967. Appellants presented no competing expert valuation of the collateral or the adequate-protection claim.

After hearing testimony and oral argument, the bankruptcy court issued a detailed oral ruling confirming the Plan. A2523-2569. The court rejected Appellants' argument that the Plan violated the Bankruptcy Code by distributing no value to general unsecured creditors, explaining that given the secured creditors' prepetition and adequate-protection liens and superpriority adequate-protection claim, there was no unencumbered value left to distribute. A2536-2565. In fact, the court concluded the secured creditors' adequate-protection claim "far exceeds any reasonable assumption of unencumbered assets" by "an order of magnitude of *hundreds of millions of dollars*." A2560 (emphasis added).

The court likewise rejected Appellants' challenges to the amount of the adequate-protection claim. Because the secured creditors had liens on "substantially all" of the Debtors' assets, the court found, "the caselaw … is clear" that Leone properly valued the collateral by starting with the Debtors' total enterprise value rather than a "separate valuation analysis of each item of collateral." A2560-2562. The court likewise found that the February 2019 financial projections that Leone used provided a better estimate of enterprise value on the petition date than the Debtors' March 2019 projections, since the latter incorporated the future harm to the business from operating in bankruptcy (the exact harm that adequate protection exists to compensate). A2563-2565.

Finally, the court found the vast majority of the Uniti settlement proceeds were encumbered by the secured creditors' prepetition liens—in particular, their lien on the Debtors' general intangibles, which included the Debtors' recharacterization claim (the primary focus of the settlement) and its proceeds. A2544-2558. In any event, even if the settlement proceeds were unencumbered, that would just create an equivalent increase in the size of the secured creditors' adequate-protection claim, again leaving no value to distribute to the unsecured creditors. A2488-2490.

The bankruptcy court proceeded to issue an order confirming the Plan (the "Confirmation Order"), A2579-2716, which Appellants appealed. A2717-2722; SA148-151. For the next two months, Appellants made no attempt to stay the

Confirmation Order pending appeal.[2] The Debtors' reorganization is scheduled to be substantially consummated in mid-September 2020, shortly after this brief is filed. A2240-2241.

SUMMARY OF ARGUMENT

Appellants' challenge to the bankruptcy court's carefully reasoned decisions should be rejected as both equitably moot and meritless. To begin, this appeal presents a classic case of equitable mootness: Any decision for Appellants will require unscrambling a substantially consummated plan of reorganization, devastating the Debtors' hopes of emerging from bankruptcy as a going concern and disrupting countless complex financial transactions. And despite their full awareness of the risk of equitable mootness, Appellants made no meaningful effort to avoid that risk by staying the orders they now challenge. Under settled Second Circuit precedent, *each* of those circumstances makes this appeal equitably moot and forecloses Appellants from pursuing it further.

Even if the Court were to reach the merits, it should easily affirm. As to the Settlement Order, the bankruptcy court came nowhere near abusing its discretion in determining that the *more than $1.2 billion* in value that the Debtors received from

[2] Two months after the Confirmation Order issued (and the day before this brief was due), U.S. Bank filed an unrelated objection in the bankruptcy court and appended a cursory and procedurally improper request to "stay the effective date [of the Plan]" pending appeal. Bankr.Dkt.2482 at 3. That is the closest either Appellant has come to seeking a stay of the Confirmation Order.

the Uniti settlement was "well above the lowest range of reasonableness." A1486. The bankruptcy court carefully and correctly applied the Second Circuit's governing seven-factor test in reaching that conclusion, and the extensive evidence presented at the court's two-day evidentiary hearing was more than sufficient to support it. Appellants' exaggerated contrary assertions ignore both the record and the bankruptcy court's meticulous analysis.

The bankruptcy court was likewise well within its discretion in confirming the Plan, which enjoyed extensive support from the Debtors' creditors (including a majority of their unsecured voting creditors) and represents the only feasible way for the Debtors to emerge from bankruptcy as a going concern. Appellants challenge only one aspect of the confirmation decision, asserting that the bankruptcy court erred in finding that the secured creditors' adequate-protection claim left no unencumbered value to distribute to unsecured creditors. But as the bankruptcy court explained, that question was not even close: The adequate-protection claim "far exceed[ed] any reasonable assumption of unencumbered assets" by "hundreds of millions of dollars." A2560. The bankruptcy court correctly rejected Appellants' meritless arguments asserting that it was required to individually value each encumbered asset (rather than valuing the business as a whole and subtracting the unencumbered assets), and to base its petition-date collateral valuation on later financial projections that already incorporated the future harm the bankruptcy would

cause. The bankruptcy court also correctly rejected Appellants' argument that the Uniti settlement was not encumbered by the secured creditors' prepetition liens, which flouts binding Second Circuit precedent—and makes no difference in any event, because any unencumbered settlement proceeds would just increase the secured creditors' adequate-protection claim. This Court should either dismiss the appeal as equitably moot or affirm.

ARGUMENT

I. The Court Should Dismiss This Appeal as Equitably Moot.

Appellants' challenges to the bankruptcy court's orders are entirely meritless. But this Court need not even review the merits, because the soon-to-be-completed substantial consummation of the Plan—which Appellants made no meaningful attempt to stay—will render this appeal equitably moot.

Equitable mootness is "a prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented." *In re Metromedia Fiber Network*, 416 F.3d 136, 144 (2d Cir. 2005). In contrast to constitutional mootness, which "turns on the threshold question of whether a justiciable case or controversy exists," equitable mootness asks "whether a particular remedy can be granted without unjustly upsetting a debtor's plan of reorganization." *Charter Commc'ns*, 691 F.3d at 481. An appeal is equitably moot "when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable"

because it would jeopardize the debtor's emergence from bankruptcy and harm other creditors. *Id.*

"[A]n appeal is presumed equitably moot where the debtor's plan of reorganization has been substantially consummated." *Id.* at 482. "Substantial consummation" means that "all or substantially all of the proposed transfers in a plan are consummated," the "successor company has assumed the business … dealt with by the plan," and the "distributions called for by the plan have commenced." *Id.* (citing 11 U.S.C. §1101(2)). If a plan is substantially consummated, the presumption of equitable mootness can be overcome only if *all* of the following five "*Chateaugay* factors" are satisfied:

> (1) the court can still order some effective relief;
>
> (2) such relief will not affect the re-emergence of the debtor as a revitalized corporate entity;
>
> (3) such relief will not unravel intricate transactions so as to knock the props out from under the authorization for every transaction that has taken place and create an unmanageable, uncontrollable situation for the Bankruptcy Court;
>
> (4) the parties who would be adversely affected by the modification have notice of the appeal and an opportunity to participate in the proceedings; and
>
> (5) the appellant pursued with diligence all available remedies to obtain a stay of execution of the objectionable order if the failure to do so creates a situation rendering it inequitable to reverse the orders appealed from.

Id. (quoting *In re Chateaugay Corp.*, 10 F.3d 944, 952-53 (2d Cir. 1993)); *see In re Kassover*, 98 F. App'x 30, 31 (2d Cir. 2004).

The Plan here will be substantially consummated on its effective date, which is scheduled to occur before this appeal will be decided (and possibly even before the briefing is complete). *See* A2240-2241. The appeal is therefore presumed equitably moot, and Appellants can overcome that presumption only by demonstrating that *all five* of the *Chateaugay* factors are met. Appellants cannot make that showing for at least three independent reasons.

First, the relief Appellants seek—undoing the Settlement Order and the Confirmation Order—would indisputably affect the Debtors' reemergence from bankruptcy. The settlement provides the Debtors with $1.2 billion in compensation, as well as numerous intangible benefits. *Supra* p.7. Those benefits are key to the success of the Plan—which is why the Plan is expressly conditioned on consummation of the settlement transactions. A1681. The Plan in turn provides the only available option for the Debtors to emerge from bankruptcy. A2008 (uncontroverted testimony that the Plan is "the exclusive option for Windstream to emerge from chapter 11 as a healthy and viable enterprise"). Reversing either the Settlement Order or the Confirmation Order would not only "affect" the Debtors' emergence from bankruptcy, *Chateaugay*, 10 F.3d at 952, but potentially prevent it entirely.

Second, and equally conclusive, reversal of the Settlement and Confirmation Orders would unravel intricate transactions and create an unmanageable,

uncontrollable situation for the bankruptcy court. *Id.* The Plan depends on the transactions envisioned by the settlement, including substantial payments from Uniti to the Debtors, the sale of certain assets, and assumption of the modified leases—transactions that cannot be readily undone. The Plan also involves further intricate transactions, including distribution of the settlement proceeds, cancellation of existing interests in the Debtors, issuance of reorganized equity interests, distribution of proceeds from the new credit facility, approval of liens and security interests granted under the new credit facility, and completion of a $750 million rights offering. *See* A1652-1659, A1720, A1722-1724, A2606-2608. Unwinding the Debtors' substantially consummated Plan would, in these circumstances, "work incalculable inequity to many who have extended credit, settled claims, relinquished collateral and transferred or acquired property in legitimate reliance on the unstayed order of confirmation." *In re Granite Broad. Corp.*, 385 B.R. 41, 52 (S.D.N.Y. 2008); *see also, e.g.*, *In re Source Enters.*, 392 B.R. 541, 551 (S.D.N.Y. 2008) (appeal equitably moot where requested relief would require unraveling transfers of property and distributions of money and stock); *Six W. Retail Acquisition v. Loews Cineplex Entm't Corp.*, 286 B.R. 239, 247 (S.D.N.Y. 2002) (appeal equitably moot where unraveling settlement would call into question validity of liens and distributions to creditors).

Third, and again independently conclusive, Appellants did not "pursue[] with diligence all available remedies to obtain a stay" of the orders they challenge. *Charter Commc'ns*, 691 F.3d at 482. Despite being fully aware of the possibility of equitable mootness—and relying on that possibility to seek an extraordinarily expedited schedule, *see* Dkt.4, No.20-cv-5440—Appellants made no effort to seek a stay of either order for more than two months after the Confirmation Order issued, and then contented themselves with tacking a cursory and procedurally improper request to "stay the effective date [of the Plan]" onto an unrelated objection. Bankr.Dkt.2482 at 3; *see supra* pp.15-16 & n.2.

Diligence in seeking a stay is a "chief" consideration among the *Chateaugay* factors, and an appellant must seek a stay "even if it may seem highly unlikely that the bankruptcy court will issue one." *Metromedia*, 416 F.3d at 144. Conversely, failure to seek a stay is tantamount to forfeiture, and is often decisive in the equitable mootness analysis. *See id.*; *Kassover*, 98 F. App'x at 32. By choosing not to seek a stay for months after the Confirmation Order issued, and then putting forward only a perfunctory and procedurally flawed "request" in an unrelated objection, Appellants consciously chose to run the risk that the Plan would be substantially consummated before their appeal could be decided. *See In re Chateaugay Corp.*, 988 F.2d 322, 326 (2d Cir. 1993) ("The party who appeals without seeking [a stay] does so at his own risk."). Given Appellants' *ex ante* choice to make no real attempt

to stay the transactions at issue, it would be exceptionally inequitable to now try to unscramble those complex transactions *ex post*—especially when doing so would harm third parties who have relied on the bankruptcy court's orders, and force the Debtors back into a prolonged bankruptcy. Because Appellants cannot overcome the presumption of equitable mootness, the Court should dismiss this appeal.

II. The Bankruptcy Court Did Not Abuse Its Discretion in Approving the Uniti Settlement.

If this Court does reach the merits of the Settlement Order, it should affirm. As the record demonstrates, the bankruptcy court properly approved the Uniti settlement—which provided the Debtors more than *$1.2 billion* in net present value—as "well above the lowest range of reasonableness." A1486.

A. The Bankruptcy Court Applied the Correct Legal Standard.

A bankruptcy court deciding whether to approve a settlement must consider the seven *Iridium* factors to determine whether the settlement is fair and equitable. *Iridium*, 478 F.3d at 462; *see supra* pp.7-8. The bankruptcy court's task is not to determine whether the settlement was "the best the debtor[s] could have obtained," *In re Charter Commc'ns*, 419 B.R. 221, 252 (Bankr. S.D.N.Y. 2009), but only ensure that the settlement does not fall "below the lowest point in the range of reasonableness." *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983).

The bankruptcy court here faithfully and accurately applied the *Iridium* factors, explaining why each factor favored approving the settlement. A1484-1496.

Appellants do not challenge the vast majority of the bankruptcy court's legal reasoning, raising only three purported legal errors—all of which primarily challenge the bankruptcy court's factual findings and discretionary judgment rather than its legal analysis. None of those purported errors has any substance.

1. The Bankruptcy Court Correctly Weighed the Debtors' Likelihood of Success in the Uniti Adversary Litigation Against the Future Benefits of the Settlement.

Appellants begin by arguing that the bankruptcy court misapplied the first *Iridium* factor, by failing to "determine[] what the Debtors would recover if they succeeded in litigation against Uniti or the likelihood of success on those claims." Br.24. That argument is frivolous. As the record shows, the bankruptcy court did precisely what it was supposed to do in evaluating the first *Iridium* factor: It carefully balanced the Debtors' likelihood of success (and their likely recovery if successful) against the benefits that the Debtors would receive from the settlement, and concluded that balance weighed heavily in favor of approving the settlement. A1475-1482, A1485-1486. The bankruptcy court made no legal error, and came nowhere near abusing its discretion, in reaching that conclusion.

In evaluating the first *Iridium* factor, a bankruptcy court is not required to "decide the numerous questions of law and fact" involved in the litigation and determine precisely how the case would have been resolved. *W.T. Grant*, 699 F.2d at 608. Instead, its duty is only to "canvass the issues" and ensure that the settlement

does not fall below the bottom end of the range of reasonable outcomes. *Id.* The bankruptcy court here did exactly that: It began with a lengthy and thorough analysis of the merits of the Debtors' claims, explaining that the Debtors faced "substantial litigation risks" in seeking to recharacterize the Master Lease as a financing arrangement. A1486-1487; *see* A1475-1482. For one thing, the Debtors faced a "strong" presumption that the Master Lease was in fact a lease, as it declared on its face and as the parties had agreed. A1478 (citing *PCH*, 804 F.2d at 200). As the bankruptcy court recognized, overcoming that presumption would be especially difficult here and would require the Debtors to litigate numerous fact-specific questions under legal standards that are "not entirely clear." A1478-1479. Even if the Debtors were to prevail on the merits of their claim, they would then face further uncertain litigation over the nature of the proper remedy, since recharacterization would give Uniti a multi-billion-dollar counterclaim against the Debtors that would arguably be secured by an equitable lien on the recharacterized assets—resulting in no additional value for other creditors, or at least dramatically "dilut[ing] the recoveries." A1479-1480; *see In re PCH Assocs.*, 949 F.2d 585 (2d Cir. 1991) (holding recharacterization resulted in an equitable mortgage); A1427; SA28-29. The Debtors' breach-of-contract and fraudulent-transfer claims likewise faced "significant problems on the merits" and an "uphill fight," which the bankruptcy court described in detail. A1480-1481.

By contrast, the bankruptcy court found, the settlement would provide the Debtors with an "assured recovery" of "substantial value"—including not only more than *$1.2 billion* in quantifiable economic benefits, but also "important, not easily quantifiable" benefits like the flexibility created by separating the Master Lease into separate leases and the realignment of the tenant capital improvements provisions. A1485-1486. Weighing those immense benefits against the substantial risks of further litigation, and considering the "range of [reasonable] recoveries … in terms of handicapping the litigation's outcome," the bankruptcy court properly concluded that the settlement fell "well above the lowest range of reasonableness." A1486.

Appellants' contrary arguments distort both the law and the record. Appellants concede (with considerable understatement) that the bankruptcy court "did spend some time reviewing the complexity and lack of certainty surrounding a recharacterization claim," but assert the bankruptcy court failed to apply that law to the specific facts of this case. Br.24. Not so. Despite what Appellants suggest, Uniti never "agreed" that the recharacterization claim here was likely to turn solely on the useful life of the leased property. *See, e.g.*, SA22-27. On the contrary, as the bankruptcy court found, there is "no clear formula" for deciding recharacterization claims, which (here as in every other case) are "quite facts driven" and do not turn exclusively on any one issue. A1478-1479. Given the "strong presumption" against recharacterization, the complex nature of the inquiry, the Debtors' numerous

statements characterizing the Master Lease as a lease, and the contemporary professional opinions confirming that characterization, the bankruptcy court was entirely correct (and entirely within its discretion) to reject Appellants' caricature of the recharacterization claim as an easy win. A1478-1479.

The bankruptcy court also was not obligated to accept Appellants' contention that Uniti had "no competent evidence" on the useful-life issue, Br.25, which rests entirely on their assumption that Uniti's expert would have been excluded, *see* Br.10-11. On the contrary, Uniti made clear it was prepared to offer substantial evidence on that issue, including Ernst & Young's professional opinion when the Master Lease was signed that the assets' weighted average useful life was 28 years (far more than the 15-year initial lease term). SA23-26. Nor was the bankruptcy court required to specifically discuss the other "numerous questions of law and fact" raised in the underlying litigation, *W.T. Grant*, 699 F.2d at 608, including "the state of the experts" and the "hundreds of trial exhibits that had been submitted," Br.25. Instead, the bankruptcy court was required only to "canvass the issues" to evaluate the reasonableness of the proposed settlement. *W.T. Grant Co.*, 699 F.2d at 608. That is precisely what the bankruptcy court did, and its conclusion that the recharacterization claim faced substantial risks was thoroughly supported by the record.

Appellants argue next that the bankruptcy court failed to specifically calculate what the Debtors would receive if they prevailed in the litigation. Br.25-26. Appellants cite no law whatsoever—and the Debtors are aware of none—requiring a bankruptcy court reviewing a settlement to determine the specific dollar value a debtor might recover by continuing to litigate. *See Nellis v. Shugrue*, 165 B.R. 115, 122 (S.D.N.Y. 1994) (bankruptcy court "should not conduct a 'mini-trial' on the merits" to determine the reasonableness of a settlement). In any event, the bankruptcy court *did* explicitly recognize that a "homerun victory" on the recharacterization claim would provide sufficient recovery to repay the unsecured creditors. A1488. But as the bankruptcy court properly recognized, that "homerun" result was exceptionally unlikely in light of the substantial hurdles the Debtors' recharacterization claim faced. A1488; *see* A1486. The bankruptcy court's resulting conclusion—that the "substantial litigation risks" the Debtors faced made the proposed $1.2 billion settlement "well above the lowest range of reasonableness"—was neither legal error nor an abuse of discretion. A1485-1486; *cf.* A2424.

Appellants' remaining arguments on the first *Iridium* factor are equally meritless. Appellants take issue with the bankruptcy court's statements that it had "been through the cases" and "prepared for trial," and so had "a pretty good idea of how [the trial] would've turned out." Br.26 (quoting A1428). Those statements show only that the experienced bankruptcy judge here was thoroughly prepared and

thoroughly familiar with the relevant issues—not, as Appellants suggest, that he was somehow prejudiced. *Contra* Br.26.

Next, Appellants fault the bankruptcy court for not discussing the Debtors' breach-of-contract and fraudulent-transfer claims in more detail. Br.27. But as all the parties and the court agreed, the Debtors' most important claim by far was the recharacterization claim—and yet the court still spent a full transcript page explaining why the breach-of-contract and fraudulent-transfer claims faced "significant problems on the merits" and "would be an uphill fight." A1480-1481. That analysis more than satisfied the court's obligation to "canvass the issues" on those claims and ensure the reasonableness of the settlement. *W.T. Grant*, 699 F.2d at 608.

2. The Bankruptcy Court Correctly Determined that the Debtors' Evaluation of the Settlement Was Proper.

Appellants' next challenge fares no better. Under the seventh *Iridium* factor, the bankruptcy court was required to evaluate whether the settlement was the product of arm's-length bargaining between the parties. The court found that factor readily met here, noting the "lengthy" and "hard-fought" seven-month mediation process overseen by an experienced bankruptcy judge, including 27 mediation sessions that often went "all day and into the night." A1490. The bankruptcy court also concluded that the Debtors' own consideration of the settlement was proper, finding "absolutely no evidence" that any officer or director had acted "in any way

improperly" or from personal interest. A1491. The court further noted that even though the corporate-law "entire fairness" standard did not apply, the settlement would meet that heightened standard. A1491.

Appellants do not raise any legal challenge to the bankruptcy court's finding that the settlement resulted from a lengthy and hard-fought mediation. Instead, Appellants argue the court erred by "misapplying" the entire fairness standard—a standard Appellants never even mentioned in their briefing below. *See* A1065-1109. Their argument is not only forfeited, but also fails on the merits.

First, as the bankruptcy court held, the entire fairness standard does not apply in reviewing a proposed settlement under Rule 9019 and the *Iridium* factors. A1491; *see* A1394. The entire fairness standard is a state-corporate-law standard that governs when shareholders ask a court to determine *ex post* whether a self-interested corporate transaction was "entirely fair." *See, e.g.*, *Weinberger v. UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983). That standard has no relevance in the *ex ante* evaluation of a proposed settlement under Rule 9019. *See, e.g.*, *In re Dewey & LeBoeuf LLP*, 478 B.R. 627, 641 (Bankr. S.D.N.Y. 2012); *In re Rock & Republic Enters.*, No.10-11728, 2011 WL 6445420, at *1 n.3 (Bankr. S.D.N.Y. Dec. 22, 2011) ("Where a settlement is brought before the Court, the 9019 standard governs rather than a business judgment or a business judgment 'plus' standard."); A1394. Appellants cite no authority (and the Debtors are aware of none) holding that federal bankruptcy

courts should evaluate proposed Rule 9019 settlements under an imported state-corporate-law entire fairness standard.

Second, even if the entire fairness standard could theoretically apply under Rule 9019, it would not be triggered here. Appellants assert that six of the Debtors' nine directors who approved the settlement were "not disinterested" because they were on the board at the time of the Uniti transaction, would obtain releases related to that transaction, and "would have received Uniti stock in the transaction." Br.28.[3] But the entire fairness standard is only triggered if the alleged conflict of interest is of "sufficiently material importance" to make it "improbable that the director could perform her fiduciary duties … without being influenced by her overriding personal interest." *In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 45 (Del. Ch. 2013). Appellants cite nothing even remotely suggesting that a possible release of hypothetical claims, or a small amount of the counterparty's stock, constitutes the kind of personal interest in a settlement that would require entire fairness review—and the bankruptcy court correctly determined that it was not. A1395 (noting that any personal interest "was just not anywhere close to what was driving [the directors'] decision making").

[3] In fact, as far as the record shows, only three directors held Uniti stock while voting on the settlement. SA46-57; *cf. Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1170 (Del. 1995) (business judgment rather than entire fairness standard applies when "a majority of directors is disinterested and independent").

Third, even if the entire fairness standard were applicable and triggered, the bankruptcy court correctly determined the settlement was entirely fair in both process and substance. As to process, the court examined the Debtors' thorough deliberations in investigating, pursuing, and ultimately settling the claims at issue, and concluded there was "absolutely no evidence" that any purportedly interested director had acted "in any way improperly." A1491. Indeed, Appellants tacitly concede the point, pointing to no indication of any actual malfeasance. Br.29-30. Notably, the Windstream board voted *unanimously* to approve the settlement, and Appellants cite nothing to suggest the outcome would have been different if only the disinterested directors had voted. A1123. As to substance, the bankruptcy court carefully considered the $1.2 billion settlement value and determined that it was "well above" the low end of any reasonable range. A1486. Those findings are more than enough to support the bankruptcy court's determination that even if the entire fairness standard applied, that standard "would be met." A1491.[4]

3. The Bankruptcy Court Correctly Approved the Asset Sale and Lease Assumption Components of the Settlement.

Appellants' separate and unrelated challenge to the asset sale and lease assumption components of the settlement likewise fails. To begin, Appellants

[4] Appellants wrongly claim heightened scrutiny is warranted because U.S. Bank and a handful of other "disinterested" creditors opposed the settlement. *Contra* Br.30. In reality, the vast majority of the Debtors' "disinterested" creditors *support* the settlement. *Infra* p.38.

forfeited that challenge by "fail[ing] to designate [it] as an issue on appeal" in their Rule 8006 statement of issues. *In re Uni-Rty Corp.*, No.96-cv-4573, 1998 WL 299941, at *3 n.4 (S.D.N.Y. June 9, 1998), *aff'd*, 175 F.3d 1008 (2d Cir. 1999); *see, e.g.*, *In re GGM, P.C.*, 165 F.3d 1026, 1031 (5th Cir. 1999); *In re Freeman*, 956 F.2d 252, 255 (11th Cir. 1992) (issue not raised in the statement of issues "is deemed waived and will not be considered on appeal"). Appellants listed four issues in their statement of issues on appeal from the Settlement Order, corresponding directly to Parts I.A.1, I.A.2, I.B, and the unnumbered request for reassignment in their opening brief. *Compare* Dkt.6 at 2, No.20-cv-4276, *with* Br.23-30, 39. None of those stated issues even remotely hinted that Appellants also intended to challenge the settlement's asset sale and lease assumption components under §363 and §365, and this Court should decline to consider that plainly forfeited argument.

Regardless, Appellants' challenge is meritless. Section 363(b) of the Bankruptcy Code permits a debtor, after notice and a hearing, to sell assets outside the ordinary course of business in its sound business judgment. 11 U.S.C. §363(b)(1); *In re Gucci*, 126 F.3d 380, 387 (2d Cir. 1997). Section 365(a) likewise permits a debtor to assume a lease in its sound business judgment. 11 U.S.C. §363(a); *In re Orion Pictures Corp.*, 4 F.3d 1095, 1099 (2d Cir. 1993). Courts evaluating an asset sale or lease assumption under those provisions take a flexible approach, considering factors such as sound business purpose, adequate notice to

interested parties, fair and reasonable value, and good faith. *See, e.g.*, *In re Glob. Crossing Ltd.*, 295 B.R. 726, 744-45 (Bankr. S.D.N.Y. 2003) (citing *In re Lionel Corp.*, 722 F.2d 1063, 1071 (2d Cir. 1983)); *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 71 (Bankr. S.D.N.Y. 2016), *aff'd*, 567 B.R. 869 (S.D.N.Y. 2017), *aff'd*, 734 F. App'x 64 (2d Cir. 2018).

Applying those factors to the asset sale and lease assumption here, the Debtors explained the transactions were (1) justified by the sound business purpose of settling claims and avoiding further litigation with Uniti, (2) based on adequate notice to interested parties, (3) in exchange for fair and reasonable value in the context of the settlement as a whole, and (4) products of good-faith, arm's-length bargaining. A504-508. The bankruptcy court agreed, explicitly adopting the "legal and factual bases" set forth in the Debtors' motion and approving the settlement transactions (including the asset sale and lease assumption components) as "represent[ing] the reasonable exercise of sound and prudent business judgment by the Debtors." A1562, A1565.

Appellants assert the bankruptcy court should have made more "findings" to show the asset sale was in exchange for reasonable value and the transactions were an exercise of sound business judgment. Br.32. But the bankruptcy court made the necessary findings in the Settlement Order, and adopted the supporting legal and factual bases in the Debtors' motion. A1565; *see* A1561 (settlement provided the

Debtors "reasonably equivalent value and fair and adequate consideration"); A1562 (settlement transactions were "reasonable, fair and equitable and supported by adequate consideration," "in the best interests of the Debtors," and represent "the reasonable exercise of sound and prudent business judgment"); A1571 (lease assumption was an exercise of "sound business judgment" and "in the best interest of the estate and creditors"); A1582 (consideration paid by Uniti in asset sale was "fair and reasonable"); *see also* A1486 (noting benefits to the Debtors from the amended leases). Appellants cite no authority for their assertion that the bankruptcy court was required to spell out its findings in more detail.

Alternatively, Appellants argue the bankruptcy court could not make the necessary findings because there was "no record" on how the settlement proceeds would be allocated or the specific rent amount under the leases. Br.32-33. On the contrary, as the bankruptcy court recognized, the record showed the rent would be determined by a "fair value appraisal" that "would result in a fair rent." A1492-1493; *see* A1739. And as Appellants concede, a bankruptcy court can properly find that "a multiple-debtor settlement benefits all of them (directly and indirectly)," Br.32-33 n.9, and so provides reasonable value and constitutes sound business judgment for each debtor even if "the burdens, or benefits … might appropriately vary from one to another." *In re Adelphia Commc'ns Corp.*, 327 B.R. 143, 172 (Bankr. S.D.N.Y. 2005). That is precisely what the bankruptcy court found here: that

the immense $1.2 billion in present value provided under the settlement would create significant direct and indirect benefits for all of the Debtors, especially when compared with the only available alternative (remaining in bankruptcy and continuing to hemorrhage millions in litigation and restructuring costs each month). *See* A1116, A2497-2498. The bankruptcy court was well within its discretion to conclude that those benefits made the asset sale and lease assumption a sound business transaction for each Debtor. *Adelphia*, 327 B.R. at 172.

B. The Bankruptcy Court Was Well Within Its Discretion in Approving the Settlement.

In addition to their purported legal arguments, Appellants challenge the bankruptcy court's evaluation of four of the *Iridium* factors on the record presented at the settlement hearing. As Appellants concede, those challenges are reviewed only for abuse of discretion. Br.33. Appellants come nowhere near satisfying that deferential standard.

1. The Bankruptcy Court Properly Found the Settlement Would Avoid Complex and Protracted Litigation and Significant Costs.

Appellants begin with a brief and meritless attack on the bankruptcy court's finding under the second *Iridium* factor that the Debtors would face complex, protracted, and expensive litigation in the absence of a settlement. Br.34-35. The court based that finding on abundant record evidence, including the complex and fact-specific nature of the claims involved; the equally complex litigation that would

be required over the proper remedy; the inevitable appeal(s) that would follow any final judgment; and the fact that further litigation could force the Debtors to remain in bankruptcy for an additional *6 to 12 months*, A1115, and suffer additional restructuring costs of some *$30 million per month* during that time, A1116. A1486-1488; *see* A1113-1122. That evidence was more than adequate to support the court's conclusion that the second *Iridium* factor favored approving the settlement.

Appellants fault the bankruptcy court for discussing the extensive costs of further litigation "[w]ithout any citation to the record." Br.34-35. But the bankruptcy court was not required to recite specific record citations in its oral ruling, and Appellants do not seriously contend that the record was inadequate to support the court's findings. Appellants fault the Debtors for not preparing a specific "budget or timeline" for the Uniti litigation, or explaining "how the Settlement would get them out of bankruptcy," Br.35; but Appellants cite no law remotely suggesting that a debtor must present a formal budget to show exactly how expensive continued litigation would be, and the record more than supported the bankruptcy court's conclusion here that the cost would be "clearly substantial." A1488. Moreover, the record shows that the Debtors' ability to settle with Uniti was fundamental to their ability to emerge from bankruptcy, and that litigating those claims would have extended the Debtors' time in bankruptcy by half a year or more (at an additional cost of some $30 million per month). A1115-1116; SA3; *see also*

A1112-1116. That record easily sustains the bankruptcy court's determination that the cost of continuing to litigate strongly favored approving the settlement.

2. The Bankruptcy Court Properly Found the Settlement Served the Interests of Creditors and Had Widespread Support.

Appellants next challenge the bankruptcy court's analysis of the third and fourth *Iridium* factors, the paramount interests of creditors and whether other parties support the settlement. As the bankruptcy court held, those factors plainly favor approving the settlement here. The settlement will provide massive value for the creditors' benefit, and "substantial creditors are in support of the settlement both in terms of dollar amount and number," including (as of the settlement hearing) the owners of more than 92% of the Debtors' first-lien debt, more than 52% of its second-lien debt, and more than 39% of its unsecured notes. A1488-1489; *see* A1123-1124.

Appellants do not dispute that the settlement gives the Debtors more than $1.2 billion in value for the ultimate benefit of their creditors. Br.13. Nor do Appellants dispute that the vast majority of the Debtors' first-lien debt, a majority of its second-lien debt, and even a substantial minority of its unsecured debt supported the settlement. *See* Br.35-36. Instead, Appellants contend the bankruptcy court abused its discretion by focusing on the substantial creditor support for the settlement rather

than the remaining unsecured creditors who opposed it. Br.36-37. Appellants are wrong.

To begin, Appellants err by suggesting the "vast majority of creditors" in support were somehow "part of the settlement." Br.36. The only parties to the settlement are the Debtors and Uniti; none of the creditors supporting the settlement are parties, or receive any payment or other consideration under the settlement agreement. A1557. The fact that many of the supporting creditors will be paid under the Plan or receive equity in the reorganized Debtors, Br.36, only underscores that those creditors' views *should* be taken into account, since they would ultimately bear the cost of continuing the litigation and delaying the Debtors' emergence from bankruptcy. *See* A1488-1490 (explaining that the senior creditors' interests "reflect an accurate weighing of the risks and rewards of settlement versus litigation").

Conversely, the bankruptcy court was entirely correct (and well within its discretion) to place less weight on the views of objecting unsecured creditors like Appellants. As the bankruptcy court recognized, those creditors were out-of-the-money claimants who would bear none of the cost of continued litigation, and so had nothing to lose from attempting to force the Debtors to gamble on a "homerun victory" in risky litigation. A1488-1489. It was wholly appropriate for the court to "heavily discount" the views of those unsecured creditors, who were "seeking merely to gamble with the senior creditors' recovery in the unreasonable hope of

hitting a litigation jackpot." *In re Remsen Partners, Ltd.*, 294 B.R. 557, 567 (Bankr. S.D.N.Y. 2003).[5]

3. The Bankruptcy Court Properly Found the Settlement Was the Product of Arm's-Length Bargaining.

Finally, Appellants again challenge the bankruptcy court's determination under the seventh *Iridium* factor that the settlement was the product of arm's-length bargaining. Once again, their challenge falls flat. Appellants do not dispute that, as the court found, the settlement was the product of a "lengthy" and "hard-fought" mediation, lasting through 27 sessions over a period of seven months, supervised by an experienced bankruptcy judge. A1490-1491. The Debtors and Uniti were not required to waive the mediation privilege and reveal the substance of their discussions for the court to properly conclude that mediation was a legitimate arms-length negotiation and not a collusive sham. *Contra* Br.38. Nor were the Debtors and Uniti required to invite unsecured creditors who would not receive any settlement proceeds to their mediation sessions. *Contra* Br.38; *cf.* A2446-2447 (rejecting the argument that "everyone has to be in the room at every time").

Appellants repeat their assertion that the mediation "could not have been conducted at arm's length" because (they say) the Debtors' representatives "were

[5] Appellants' suggestion that unsecured creditors could have recovered "as much as $250 million" under the settlement, Br.37, ignores the secured creditors' adequate-protection claim. *Infra* pp.43-52.

not disinterested." Br.38. But as the bankruptcy court concluded, any minimal personal interest the Debtors' representatives may have had "was just not anywhere close to what was driving their decision making," A1395, and there was "absolutely no evidence" that anyone acted "in any way improperly" in negotiating or approving the settlement, A1491. *See supra* p.32. The mere fact that the settlement here (like countless others) provides releases for directors and officers is hardly grounds to conclude that the seventh *Iridium* factor weighs against it, much less that the bankruptcy court abused its discretion by finding otherwise. *Contra* Br.38-39; *see, e.g.*, *In re Sabine Oil & Gas Corp.*, 555 B.R. 180, 309 (Bankr. S.D.N.Y. 2016); *Dewey & LeBoeuf*, 478 B.R. at 644.

C. Appellants' Request for Reassignment Is Meritless.

Appellants tack on a perfunctory request that if this Court reverses the Settlement Order, it should also reassign the adversary proceeding. Br.40-41. They rely solely on a single comment by the experienced bankruptcy judge, who explained that he had a good understanding of the strength of the recharacterization claim because "I've been through the cases, I've prepared for the trial, and I think I probably have a pretty good idea of how it would've turned out, since I was going to try it." A1428. That lone comment—expressing only that the court was fully prepared to evaluate the settlement—comes nowhere near the kind of fact that "might reasonably cause an objective observer to question the judge's impartiality."

Ashmore v. CGI Grp., 923 F.3d 260, 283 (2d Cir. 2019). It plainly does not warrant reassignment.

III. The Bankruptcy Court Did Not Abuse Its Discretion in Confirming the Plan.

The bankruptcy court was likewise correct, and well within its broad discretion, to confirm the Plan. *Kirwan*, 592 B.R. at 500 (confirmation order is reviewed for abuse of discretion). The Plan represents the only feasible path for the Debtors to emerge from bankruptcy, maximizing recoveries for their creditors and benefiting literally thousands of vendors, employees, and customers by preserving the Debtors' business. Unsurprisingly, the Plan was supported by the vast majority of the Debtors' creditors—including, notably, a majority of the unsecured creditors whose interests Appellants claim the Plan harmed. A2524. As the bankruptcy court explained at length, the Plan was not only in the best interests of the Debtors and all their creditors, but readily met all of the requirements for confirmation under the Bankruptcy Code. A2524-2569, A2580-2605.

Appellants challenge only one aspect of the bankruptcy court's confirmation ruling, asserting that the court erred in concluding that the secured creditors' prepetition liens and their adequate-protection claim left no unencumbered value for unsecured creditors. Br.40-55. But as the court explained, the secured creditors' adequate-protection claim exceeded any reasonable estimate of the Debtors' unencumbered value by "hundreds of millions of dollars." A2560. Notably,

Appellants presented no competing expert valuation of the secured creditors' collateral or the size of their adequate-protection claim. Their attacks on the bankruptcy court's conclusions fail both on the law and on the record.

A. The Bankruptcy Court Correctly Applied Supreme Court and Second Circuit Precedent in Adopting the Debtors' Adequate-Protection Methodology.

Appellants give two reasons for asserting that the bankruptcy court overestimated the secured creditors' adequate-protection claim by hundreds of millions of dollars. Br.42-50. First, they claim the bankruptcy court erred in valuing the secured creditors' collateral on the petition date by starting with the Debtors' enterprise value and subtracting the unencumbered assets, rather than starting with zero and adding up the encumbered assets. Br.42-45.[6] Second, they say the court erred in determining that the Debtors' February 2019 financial projections provided a better estimate of their enterprise value on the February 25, 2019 petition date than their March 2019 projections. Br.46-50. Neither argument is remotely persuasive.

1. The Bankruptcy Court Correctly Used Total Enterprise Value as a Starting Point in Valuing the Collateral.

Under the Bankruptcy Code, secured creditors are entitled to a superpriority adequate-protection claim for any decline in the value of their collateral caused by the bankruptcy proceedings. 11 U.S.C. §§361, 507(b); *see* A349 (granting adequate-

[6] Notably, Appellants do not challenge the court's use of that exact same valuation method to value the collateral on the effective date. A2436-2437.

protection claim "in an amount equal to the aggregate diminution in the value" of the collateral). The value of that collateral is "determined in light of the purpose of the valuation and of the proposed disposition or use of such property." 11 U.S.C. §506(a)(1); *see Assocs. Commercial Corp. v. Rash*, 520 U.S. 953, 962 (1997). Where, as here, a debtor intends from the outset to continue as a going concern, collateral is valued at its "fair market value in the hands of the Debtors" in that going concern. *In re Residential Capital, LLC* ("*ResCap*"), 501 B.R. 549, 595 (Bankr. S.D.N.Y. 2013); *see In re Sabine Oil & Gas Corp.*, 547 B.R. 503, 578 (Bankr. S.D.N.Y. 2016).

The bankruptcy court properly applied those principles here. As the court recognized, the Debtors' secured creditors have sweeping liens on "substantially all of the assets … of the Debtors," including equipment, contracts, goodwill, non-tort litigation claims, and other tangibles and intangibles. A2560; *see* SA80-82. Under those circumstances, the court explained, "the caselaw … is clear" that a bankruptcy court need not (and should not) individually calculate the value of each of the myriad assets at issue; instead, "the proper methodology" is to simply determine the value of the entire business, and then subtract the value of any unencumbered assets. A2561 (citing, *inter alia*, *ResCap*, 501 B.R. at 590-96; *Sabine*, 547 B.R. at 576-77; *In re Hawaiian Telcom Commc'ns*, 430 B.R. 564 (D. Haw. 2009)); *see also, e.g.*, *In re Journal Register Co.*, 407 B.R. 520 (Bankr. S.D.N.Y. 2009); *In re Chateaugay*

Corp., 154 B.R. 29, 34 (Bankr. S.D.N.Y. 1993). That approach is not only far more efficient, *see* A2562, but follows directly from the principle that collateral must be valued by how the debtor chooses to use the property—here, as part of an ongoing business. *Rash*, 520 U.S. at 962; *see* A2561-2562. Unsurprisingly, Appellants cannot cite a single case deeming that methodology categorically inappropriate. *See* A2441-2442 (explaining that Appellants' argument "is contrary to the case law").

Appellants respond by misstating the bankruptcy court's holding, claiming it used enterprise value as a "substitute" for valuing the collateral itself. Br.42-43. But as its ruling makes abundantly clear, the court used the Debtors' enterprise value only as a *starting point* for its valuation of the collateral, before subtracting the value of the unencumbered assets (leaving only the value of the encumbered collateral). A2561-2563. Appellants' repeated assertion that Leone "conceded" this valuation approach was "not based on a generally accepted methodology," Br.40, Br.45, is simply false. *Supra* p.13 & n.1.

Alternatively, Appellants contend that the bankruptcy court's approach "could only ever be appropriate" if the secured creditor holds "an all-encompassing lien on a going-concern business." Br.43. But the sole case they cite proves *exactly the opposite*, as the court there approved the same approach used here even though the creditors had no "all-encompassing lien." *Chateaugay*, 154 B.R. at 34. No case adopts Appellants' categorical rule that enterprise value can be considered only if

there is a lien on literally every asset, and countless cases disagree. *See* A2562 (citing cases); *Hawaiian Telcom*, 430 B.R. 564; *Journal Register Co.*, 407 B.R. 520; *see also* A2442 (recognizing that the caselaw is "completely against" Appellants' position). In fact, Appellants concede that prior decisions endorse the enterprise-value approach when the collateral includes "substantially all assets of all debtors," Br.45 n.13—and that is *precisely* what the bankruptcy court found to be the case here. A2560 ("[T]he secured creditors have liens on substantially all of the assets of the Debtors."). As for Appellants' assertion that valuation has taken much longer in other cases, Br.43, it only reinforces the wisdom of the bankruptcy court's approach, *see* A2562; and in any event, the primary reason the hearing here was relatively short is the telling fact that Appellants *never tried to present any competing valuation*.

Appellants next assert that the bankruptcy court failed to subtract the value of all the unencumbered assets. Br.44-45. They concede that the court carefully valued and subtracted the only assets that were specifically excluded from the secured creditors' liens, which the court found were worth a total of $50 million to $125 million. Br.44; *see* A2541-2544, A2561-2563. But they argue that the bankruptcy court failed to consider the value of the "Contributed Assets"—the telecommunications assets that Windstream transferred to Uniti in 2015—and the Master Lease under which Windstream leased those assets back. Br.44.

In the bankruptcy court's words: "Frankly, one wonders why this argument was made." A2558. Under both the 2015 transaction and the approved settlement, the Contributed Assets belong to Uniti (not the Debtors), and so are neither part of the Debtors' enterprise value nor unencumbered assets that should be subtracted from that value. To be sure, the existence of those outside assets—like the roads running by the Debtors' offices, their customers, and their employees—may be "integral to the operation of the enterprise," Br.44; but that does not mean their value should be subtracted from the Debtors' total enterprise value to estimate the worth of the Debtors' encumbered assets. *See* A2559 (rejecting the argument that "employees" should be subtracted from enterprise value because "secured creditors don't have a lien on employees"). Indeed, subtracting the value of every outside factor that contributes to the Debtors' value as a going concern—even if that were possible—would just end by valuing the encumbered assets at their *foreclosure* value rather than their going-concern value, which is precisely what §506(a)(1) and *Rash* forbid. *See* 520 U.S. at 962.

As for the Master Lease, the bankruptcy court recognized that "although nominally an asset," the lease "is in fact in and of itself a liability" and "lacks value," and so there was no value there for the court to subtract. A2558-2559; *cf.* Br.8 (Master Lease required "above-market" rent). Moreover, the secured creditors indisputably possess liens on any revenue streams generated by the Master Lease

(and any other unencumbered assets), meaning those revenue streams cannot be subtracted away in valuing the overall collateral package. SA80-82.[7] In short, the bankruptcy court's valuation of the Debtors' encumbered assets was both factually and legally unassailable.

2. The Bankruptcy Court Correctly Used the Debtors' February 2019 Financial Projections to Value the Collateral.

Appellants are equally wrong to challenge the bankruptcy court's determination that the February 2019 financial projections provided the best basis to estimate the collateral value as of the petition date, a determination that Appellants concede is reviewed only for abuse of discretion. *See* Br.49. To determine the value of a secured creditor's adequate-protection claim, bankruptcy courts ordinarily compare the value of the creditor's collateral on the petition date ("Time 1") with the diminished value of the collateral on the expected plan effective date ("Time 2"). *See ResCap*, 501 B.R. at 592. The court here did just that, using the Debtors' financial projections from February 2019—prepared shortly before the Debtors filed for bankruptcy on February 25, 2019—as its starting point to estimate the value of the collateral on the petition date (around [redacted]), and then comparing that

[7] Appellants also blatantly mischaracterize the record by claiming that "undisputed evidence" showed that "the Master Lease and the Contributed Assets generated more than 60 percent of the Debtors' revenues." Br.44 (apparently attempting to cite A2002, A2296, A2438-2439). The evidence showed that *the Debtor entities using those assets* (and many other assets) produce some 60% of the Debtors' revenues, not that *those assets themselves* generate those revenues. A2439.

estimate to the value of the collateral on the anticipated effective date. A2560-2561, A2563-2565; *see* A1963-1967.

Appellants contend (as they did below) that the bankruptcy court should instead have used later financial projections—from March 2019, after the Debtors had filed for bankruptcy and their projected revenues had begun to significantly decline—to assess the value of the collateral on the petition date. Br.46-50. The court rejected that contention, finding that the earlier projections provided a better estimate of the Debtors' enterprise value on the petition date. A2563-2565. That finding was well within the court's sound discretion and in no way "veered from binding precedent." *Contra* Br.46.

As Appellants' own scanty citations suggest, no binding precedent comes anywhere near requiring a bankruptcy court to base its valuation of collateral at the petition date on postpetition rather than prepetition financial projections. The authorities that Appellants cite merely repeat the undisputed point that the bankruptcy court must value the collateral *as of* the petition date. *See Rash*, 520 U.S. at 957; *ResCap*, 501 B.R. at 591-92; 4 *Collier on Bankruptcy* ¶506.03[7][a][iv] (16th ed. 2013). None of them remotely hold, as Appellants would have it, that the

petition-date valuation of assets in a going concern must be reduced to account for any future decrease in value caused by the debtor's bankruptcy.[8]

On the contrary, the *entire purpose* of adequate protection is to protect secured creditors against any "diminution in value of [the] security during a bankruptcy proceeding," including any diminution caused by the initial bankruptcy filing. *In re WestPoint Stevens*, 600 F.3d 231, 257 (2d Cir. 2010). Adequate protection serves "to insure that the creditor receives the value *for which he bargained prebankruptcy*," not just (as Appellants would have it) the diminished value of the secured assets after the debtor files for bankruptcy. *Id.* at 258 (emphasis added) (quoting *In re Swedeland Dev. Grp.*, 16 F.3d 552, 564 (3d Cir. 1994)); *see* A2565 (collateral valuation must "look at the petition date, not project in the effect of the subsequent bankruptcy"). Appellants' approach, by contrast, would improperly project the subsequent effects of the bankruptcy back in time, artificially deflating the petition-date valuation and effectively "punish[ing]" secured creditors for "consenting to the use of their collateral on a going concern basis." A2565.

[8] As the bankruptcy court recognized, this case is "obviously … different" from *ResCap* and *In re Sears Holdings Corp.*, No.18-23538 (Bankr. S.D.N.Y. July 31, 2019) (Dkt.5475), *aff'd*, No.19-cv-7660, 2020 WL 5202110 (S.D.N.Y. Sept. 1, 2020), where the parties "contemplated a prompt sale process that would inherently diminish collateral value" rather than "supporting a going concern … from day one." A2564-2565; *see Sears*, 2020 WL 5202110, at *3-4, *6-7.

Put simply, the "future harm to the company associated with operating in bankruptcy," Br.47 (quoting A2024), and the accompanying harm to the secured creditors' collateral, are exactly what adequate protection is designed to protect against. As the bankruptcy court recognized, that harm is not "materially different than the undisputed decrease in value attributed to the [future] expenditure on professional fees and other administrative expenses," A2564—an equally predictable result of the bankruptcy filing, and one that not even Appellants claim should be deducted from the collateral value on the petition date. The court was thus both correct and well within its broad discretion to determine that the February 2019 projections provided the best starting point for valuing the collateral on the petition date, rather than March 2019 projections that reflected the significant future harm that "the effect of the bankruptcy was going to have on the business" over time. Br.47 (quoting A2227).

Appellants' remaining arguments are fruitless. The fact that the bankruptcy court carefully considered Appellants' position before rejecting it hardly suggests that the court abused its discretion. *Contra* Br.48-49. Nor did the court reach its decision "without citation to either record evidence or case law," *contra* Br.49; instead, it carefully detailed the relevant facts, *see* A2563-2565, and pincited relevant precedent, *see* A2565 (citing *Sabine*, 547 B.R. at 576-77). Nor did the court "ignor[e]" testimony that the March 2019 projections "reflected the reality of the

bankruptcy as of the Petition Date," *contra* Br.49; in fact, that testimony showed that the March 2019 projections reflected the future harm that "the effect of the bankruptcy was going to have on the business" over time, A2227, and the bankruptcy court rejected the March 2019 projections for that very reason, A2563-2565.[9] Especially given the inherently fact-specific nature of the valuation inquiry, *see, e.g.*, *In re Aerogroup Int'l*, 601 B.R. 571, 593 (Bankr. D. Del. 2019), the bankruptcy court came nowhere near abusing its discretion by finding the February 2019 projections were the best input for estimating the petition-date collateral value.

B. The Bankruptcy Court Correctly Concluded the Settlement Proceeds Were Encumbered.

Finally, the bankruptcy court was entirely correct to determine that the proceeds of the Uniti settlement were encumbered by the secured creditors' prepetition liens. This Court, however, need not address that issue at all, because that determination had no effect on the confirmation of the Plan. Even if the settlement proceeds were not encumbered by the prepetition liens, they would still have to be paid to the secured creditors under their adequate-protection claim.

[9] Appellants are likewise wrong to suggest the bankruptcy court abused its discretion because the February 2019 projections were prepared before the Aurelius judgment. *See* Br.46, 49. As the court explained, that judgment "did not deprive [the Debtors of] the use of the collateral … or diminish its value." A2564; *see* A2024 (noting the decision caused a "liquidity shortfall," but "no material change to Windstream's business operations").

Again, the secured creditors' adequate-protection claim equaled the difference between the petition-date valuation of their collateral (about [redacted]) and the effective-date valuation. *See supra* pp.48-49. Based on the unrebutted evidence, the effective-date collateral valuation *assuming the settlement proceeds were encumbered* was about [redacted]. A1964. If the settlement proceeds were *not* encumbered, however, the unrebutted evidence showed that the effective-date valuation would drop by $1.2 billion (the value of the settlement) to only about [redacted]. A1964-1965. As a result, the bankruptcy court recognized, the secured creditors' adequate-protection claim would increase from around $700 million if the settlement proceeds were encumbered to around $1.9 billion if they were not. A2488-2490 (adequate-protection claim was "654 to 722 million" if proceeds were encumbered and "$1.9 billion" if not); *see* A1966-1967. That $1.9 billion adequate-protection claim would have priority over all unsecured claims, *see* 11 U.S.C. §507(b); A2538, and so the settlement value (and all other value in the estate) would be paid to the secured creditors to satisfy that claim—just as under the confirmed Plan. The Plan was thus properly confirmed (and Appellants are entitled to no recovery) whether or not the settlement proceeds are covered by prepetition liens. *Contra* Br.50-51.[10]

[10] The bankruptcy court also did not "fail to address" whether the DIP order conferred postpetition liens on the settlement proceeds. *Contra* Br.51. It made clear

In any event, the bankruptcy court was entirely correct to conclude that the settlement proceeds were encumbered by the secured creditors' prepetition liens. A2544-2558. None of Appellants' four challenges to that conclusion has merit.

First, Appellants assert that no prepetition lien could attach to the Debtors' recharacterization claim, or proceeds from the settlement of that claim, because (according to Appellants) that claim arose only postpetition. Br.51-53. That argument flies in the face of settled law and Second Circuit precedent. A2550-2555. As the bankruptcy court explained, it is "indisputable" that recharacterization claims "are not confined to bankruptcy cases," A2551; instead, they are state-law claims that arise from the transaction being recharacterized, and arise when that transaction occurs. *See* A2552 (citing cases). Indeed, the Second Circuit has squarely held as much, explaining that where agreements are executed "well before the Chapter 11 petition was filed … any claims stemming from those agreements arose prior to the filing of the petition." *PCH*, 949 F.2d at 594. Appellants' attempt to rewrite that holding, Br.52, is pure fantasy. The 2015 Uniti transaction here occurred years before the Debtors filed for bankruptcy, and so the recharacterization claim

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those liens reached "all of the DIP collateral," A2539, including the settlement proceeds—yet another reason to affirm.

stemming from that transaction "clearly arose prepetition." A2551; *see PCH*, 949 F.2d at 594.[11]

Second, Appellants contend that the secured creditors had no lien on the Debtors' prepetition recharacterization claim because any such claim was "illusory" and "doomed to failure." Br.53-54. Of course, that is hard to square with Appellants' earlier argument that the bankruptcy court should never have approved the settlement because the Debtors' recharacterization claim was actually worth more than $1.2 billion. *See* Br.23-27. In any event, the secured creditors' lien on the Debtors' general intangibles reached *all* non-commercial-tort causes of action that arose prepetition, whether or not Appellants now consider those causes of action "doomed." SA80-82; *see* A2545-2546.[12]

Third, nothing in the bankruptcy court's analysis "hinge[d]" on whether a creditor can assert recharacterization of its obligor's contract. Br.54; *see* A2522 (explaining this argument "spent the last 10 minutes arguing … about nothing").

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[11] Appellants are wrong again to claim the bankruptcy court made some "prior determination" that the recharacterization claim "was a post-petition claim." Br.51; *see* Br.20-21. Nothing in the 20 pages of irrelevant transcript Appellants cite says the Debtors' claim arose only postpetition, *see* A1528-1553, and the bankruptcy court explained in detail why it did not, *see* A2552-2556.

[12] Appellants also note that Holdings never pledged its claims to the Debtors' secured creditors. Br.53-54. But Services did, *see* SA80-82, and Appellants do not dispute (and U.S. Bank has recognized) that Services held the relevant recharacterization claim. Br.54; *see* Dkt.37 ¶1, No.19-8279 (Bankr. S.D.N.Y.) (adopting the Debtors' position).

Regardless, nothing in the transcript pages Appellants cite says that Holdings had no prepetition intercompany creditors, A2257-2259, and the bankruptcy court properly found that in fact Holdings was "a substantial net debtor to [its subsidiaries], such as Services, which have been paying the rent on the [Master Lease]." A2558; *see* A1300.

Fourth, if the bankruptcy court's analysis had relied on a creditor's ability to recharacterize its obligor's contract (which it did not, *see* A2522), the court would have been correct to conclude that any such claim would not be a commercial tort claim. Appellants cite no law whatsoever providing that a recharacterization claim is a commercial tort, and it plainly is not. *See* A2545-2546.

* * *

After eighteen months in bankruptcy, at a staggering cost to their business, the Debtors are finally emerging with a confirmed plan that represents their only available path forward as a going concern. The Plan enjoys widespread support from the Debtors' creditors, and benefits tens of thousands of vendors, employees, and customers by restoring the Debtors to financial health and allowing them to continue their business operations. As the bankruptcy court's detailed oral rulings reflect, the court carefully and correctly applied the law to the clear record evidence in approving both the $1.2 billion settlement that made the Debtors' reorganization

possible, and the reorganization itself. Appellants' attempts to disturb those detailed rulings are equitably moot and wholly meritless.

CONCLUSION

The Court should dismiss this appeal as equitably moot or affirm.

Respectfully submitted,

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I hereby certify that:

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September 2, 2020

s/Stephen E. Hessler
Stephen E. Hessler, P.C.

CERTIFICATE OF SERVICE

I hereby certify that, on September 2, 2020, an electronic copy of the foregoing Brief for the Debtors was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

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